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No. 90-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GREENVILLE PUBLIC SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

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PETITIONERS' REPLY BRIEF

PERRY SANSING
(Counsel of Record)
HOLMES S. ADAMS
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101

CLELL G. WARD
MCLEMORE & WARD
525 North Broadway
Post Office Box 575
Greenville, Mississippi 38701

Counsel for Petitioners

July 18, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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In opposing the petition for certiorari, Respondents make three primary arguments. First, Respondents contend that *Morris v. Gressette*, 432 U.S. 491 (1977), states the controlling legal principle applicable to this petition. Second, they assert that the main issue presented for review is essentially factual. Finally, Respondents argue the repeal of Miss. Code Ann. § 37-7-611 is not subject to § 5 of the Voting Rights Act.

It is equally important to highlight what Respondents do not say. They do not argue that the State of Mississippi specifically identified the voting change effected by the repeal of § 37-7-611 in its July, 1986 submission. In fact, Respondents suggest that the State did not identify the repealer to the Attorney General because the State did not initially consider

the repeal to affect voting. (pp.13-14, 23) Respondents also do not claim that the Attorney General actually reviewed this voting change in response to the 1986 submission.

Respondents nevertheless maintain the voting change was precleared because the Attorney General failed to object to the 1986 submission within 60 days even though the change was neither specifically identified in the submission nor actually considered or evaluated by the Attorney General. This position ignores the principles established in *McCain v. Lybrand*, 465 U.S. 236 (1984), and recently reaffirmed in *Clark v. Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991), regarding the obligations of a state to identify with specificity the voting changes it wishes precleared by the Attorney General.

I.

Morris v. Gressette holds that a covered jurisdiction receives administrative preclearance "once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days." 432 U.S. at 502. *Morris* does not however, address the issue decided in *McCain* and *Clark* and presented by this petition: whether a voting change was actually submitted to, and evaluated by, the Attorney General for preclearance on a particular occasion. *McCain* teaches that if a state submits some but not all of the features of an electoral scheme, "the Attorney General's failure to object to the submission would not constitute preclearance of elements in the scheme that were not submitted." 465 U.S. at 256 n.28 (citing *Morris*, 432 U.S. at 504). A voting change is not identified and a submission is not com-

plete simply because the state uses phrases such as "the complete act is submitted for review" or the act "is submitted in its entirety." App. 35a. Rather, a submission is proper only if the *voting change* is sufficiently identified to put the Attorney General on notice that review of the particular change is sought. *See Clark*, 59 U.S.L.W. at 4586.

In arguing that the 1986 submission was complete and unambiguous Respondents merely repeat the holding of the Mississippi Supreme Court. (pp.12-14) Yet, the state court and Respondents acknowledge that the voting change was not specifically identified in the 1986 submission. *See* App. 4a (Section 47 of the Uniform School Law was "not among the highlighted sections but part of the package."); Respondents' brief, p.13 ("We believe the [State] specifically brought to the attention of the [Attorney General] only those sections of the Uniform School Law which [the State] *perceived* as affecting voting."). The failure to identify a voting change in a submission is fatal to any contention that the change was submitted to or precleared by the Attorney General. *See Clark*, 59 U.S.L.W. at 4585-86.

In *Clark*, the Court concluded the district court's ruling was in conflict with *McCain* and subverted the efficacy of administrative preclearance under § 5. *Id.* at 4585. In reaffirming *McCain*, the Court stated:

> We made clear that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a submission pertains only to identified changes in that legislation. We established also that any

> ambiguity in the scope of a preclearance request must be resolved against the submitting authority.

Id. (citation omitted).

The Court reiterated the presumption that the Attorney General reviews only those voting changes identified by the state in a submission. "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." *Id.* at 4586 (quoting *McCain*, 465 U.S. at 256-57). The Court emphasized that a state "must identify with specificity each change that it wishes the Attorney General to consider." 59 U.S.L.W. at 4586. *Clark* squarely rejected the notion adopted by the state supreme court, App. 14a, that a state can obtain preclearance by implication. 59 U.S.L.W. at 4586.

Clark recognizes the adverse effect of any other approach on the Attorney General's responsibilities under § 5: "The requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." *Id.* Like the lower courts in *McCain* and *Clark*, the Mississippi Supreme Court's decision effectively imposes on the Attorney General an obligation to identify voting changes in a state's § 5 submission. *Clark* rejected this reasoning because it "would add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought to light." *Id.* The reasons for granting certiorari stated in the petition in this case mirror the rationale for the Court's decision in *Clark*. The Court should grant

review because of the obvious inconsistency between the state court's decision and *Clark*.

II.

Although Respondents argue that certiorari should be denied because the petition presents only a question of fact, they concede the state court held "*as a matter of a law on undisputed facts* there had been a 'complete submission' of" the repealer of § 37-7-611. (p.16) Based on *Clark* and *McCain*, the state court's decision that the Attorney General's approval of certain identified voting changes constituted approval of other unidentified voting changes was erroneous as a matter of law. The factual finding made by the district courts in *Clark*, 59 U.S.L.W. at 4585, and *McCain*, 465 U.S. at 257-58—that the Attorney General actually considered the voting change in issue—was not made by the Mississippi Supreme Court. Rather, the state court held that the Attorney General's failure to object to any part of the July, 1986 submission, including an unidentified voting change, constituted preclearance by *operation of law* under the principle announced in *Morris v. Gressette*.

III.

Respondents devote a significant portion of their brief to the question whether the repeal of § 37-7-611 is subject to § 5 (pp.14 n.15, 16-21), but their position has been rejected by each of the courts that have addressed this question. By reaching the preclearance question, the Mississippi Supreme Court necessarily concluded the repeal of § 37-7-611 was subject to § 5. In addition, the three-judge district court in *Dupree v. Mabus*, No. H90-0043(W) (S.D. Miss. April 2, 1991),

appeal docketed sub nom. Dupree v. Moore, 60 U.S.L.W. 3006 (U.S. June 26, 1991) (No. 90-1977), upon which Respondents rely, expressly held that the repeal of § 37-7-611 was subject to § 5. App. 19b-21b.

Respondents suggest "a simple ban on implementation of the *voting change*" in issue would present no "life or death problem," provided the school boundaries did not change. (p.17) In effect, Respondents contend the repeal of § 37-7-611 could be enforced in part (by not disturbing school boundary lines) and enjoined in part (by precluding newly annexed residents from voting in suburban school district elections). On the one hand, Respondents are willing to sacrifice the right of residents in the portion of the school district annexed by the city to vote in Western Line school board elections. (p.17) On the other hand, they recognize the "direct interest" residents of a school district have in selection of school board members because school boards "control the education of their children and determine the annual millage levy for school purposes." (p.14 n.15)

Respondents' position reflects a misunderstanding of the voting change effected by the repeal of § 37-7-611. The change in voting arises because, as the Attorney General found in his March 31, 1989 objection letter, the repealer operates to freeze municipal school district boundaries and creates "a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." App. 141a. Moreover, the repeal of § 37-7-611 involved "the revision of political boundary lines based on race which . . . is not permitted under § 5." App. 176a.

IV.

The remaining arguments raised by Respondents merit brief mention.

(1) The statements in Respondents' brief concerning the application of § 37-7-611 prior to 1986 (p.6), the justification for the repeal of § 37-7-611 (pp.6-7), and the development of Mississippi's present-day public school system (pp.4-5) were neither addressed by nor properly before the Mississippi Supreme Court when it exercised the authority granted under *Hathorn v. Lovorn*, 457 U.S. 255 (1982), to decide the voting rights issue. They are equally irrelevant to the question whether certiorari should be granted.

(2) Contrary to Respondents' assertions (p.6), Mississippi law requires that municipal annexations be reasonable. *City of Greenville v. Farmers, Inc.*, 513 So. 2d 932, 940-41 (Miss. 1987). State law provides "a mechanism whereby all political boundary disputes relating to a proposed annexation, whether they concern school or other matters, may be aired and considered in a proceeding conducted by the chancery court." App. 140a.

(3) Respondents' allegations regarding Petitioners' motive for filing this lawsuit (pp.4, 18, 21 & nn.1, 17) were rejected by the state supreme court, which reversed the trial court's award of Rule 11 sanctions and noted that Petitioners acted "prudently" based on the "very real dispute over the status of the school districts in this case." App. 20a & n.8.

(4) Respondents strenuously protest (pp.1-3) the characterization of their school district as suburban. "Suburban" means "characteristic of the suburbs or suburbanites: variously connoting a combination of ru-

ral and urban features." Webster's New Universal Unabridged Dictionary 1818 (2d ed. 1983). Apart from satisfying the definition of a suburban school district, Western Line occupies the role of the neighboring school district that the Attorney General concluded would oppose any expansion by the city school district. App. 140a.

(5) Respondents suggest that if the Petitioners prevail and expand into the portion of the Western Line district annexed by the City of Greenville, Western Line will lose "about 55%" of its tax base. (p.18) In fact, this loss would have occurred only if the City's proposed annexation had been approved in its entirety. The Mississippi Supreme Court excluded from the annexed territory Mississippi Power & Light Company's electric generating plant and Comet Delta's rice processing facility, which represented the major portion of the potential tax loss to Western Line. *Farmers, Inc.*, 513 So. 2d at 939, 942.

Petitioners mention these arguments only to correct the record. The comments by Respondents on these subjects have no relevance to the obligation of the State of Mississippi to comply with the Voting Rights Act by obtaining preclearance of the voting change effected by the repeal of § 37-7-611 before implementing that change.

This petition concerns a decision by a state court that conflicts with decisions of this Court and undermines the administration of § 5. The petition for certiorari should be granted and the decision should be reversed.

Respectfully submitted,

PERRY SANSING
(Counsel of Record)
HOLMES S. ADAMS
BRUNINI, GRANTHAM, GROWER & HEWES
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
Telephone: (601)948-3101

CLELL G. WARD
MCLEMORE & WARD
525 North Broadway
Post Office Box 575
Greenville, Mississippi 38701
(601)332-4155

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